

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-31202

U.S. COURT OF APPEALS
FILED

JAN 04 2000

CHARLES R. FULBRUGE III
CLERK

IN RE: JOHNNY MCINTYRE,

Movant.

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHERWELL, CLERK

DATE 1/13/00
BY [Signature]

Motion for an order authorizing the
United States District Court for the Western
District of Louisiana to consider a
successive 28 U.S.C. § 2254 application

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

BY THE COURT:

Johnny McIntyre, Louisiana prisoner #091519, moves this court for authorization to file a successive 28 U.S.C. § 2254 application challenging his 1979 conviction for aggravated rape. In his proposed successive § 2254 application, McIntyre attempts to raise the ineffective assistance of counsel claims that he presented in his prior § 2254 application. A claim presented in a second or successive habeas corpus application that was presented in a prior application shall be dismissed. 28 U.S.C. § 2244(b)(1). Accordingly, insofar as McIntyre seeks permission to file a successive habeas application raising the same claims he raised in his first application, his motion is DENIED.

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McIntyre also seeks to raise the issue of improper jury instructions under Cage v. Louisiana, 498 U.S. 39, 41 (1990). A second or successive § 2254 application raising a claim that was not presented in a previous § 2254 application must be determined by this court, as provided in § 2244(b)(2), to contain either newly discovered evidence or a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. § 2244(b)(2). This court may authorize the filing of a successive application only if it determines that the applicant has made a prima facie showing of satisfying the above applicable requirements. § 2244(b)(3)(C).

McIntyre fails to meet this standard. Accordingly, his motion for leave to file a successive habeas application is DENIED.*

A true copy
Test
Clerk, U. S. Court of Appeals, Fifth Circuit
By Ratony
Deputy
New Orleans, Louisiana
JAN 04 2000

*Dennis, J., concurs, being bound by *In re: Smith*, 142 F.3d 832 (5th Cir. 1998), but respectfully disagrees with its statutory interpretation and is of the opinion that it should be reconsidered by this court.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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NEW ORLEANS, LA 70130

January 4, 2000

Mr Robert H Shemwell, Clerk
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United States District Court
300 Fannin Street
Suite 1167
Shreveport, LA 71101

Misc.
00-02

No. 99-31202 In Re: McIntyre
USDC No.

Enclosed is a certified copy of the judgment issued as the mandate.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: *LaTonya Grant*
LaTonya Grant, Deputy Clerk

cc: w/encl:
Mr Johnny G McIntyre

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